that "under our Constitution courts of law alone are given power to try civilians," *id.* at 40.[7]

Two other decisions of this Court are relevant to the availability of habeas jurisdiction specifically for U.S. citizens abroad. Both involved detention based upon a relationship to international authority. In *Madsen v. Kinsella*, 343 U.S. 341 (1952), a U.S. civilian in U.S.-occupied Germany was convicted of murder by the "United States Court of the Allied High Commission for Germany," a court established by a law passed by the "Allied High Commission." *Id.* at 342-44 & n.3, 370-71. After being imprisoned in West Virginia, she petitioned the district court there for habeas corpus. *Id.* at 343, 345. On appeal, the Court exercised jurisdiction over her petition but denied the writ, finding on the merits that the military commission had the authority to try her. *Id.* at 362.

In *Wilson v. Girard*, 354 U.S. 524 (1957) (per curiam), the Court, without discussing jurisdiction, heard the merits of the habeas petition of a U.S. soldier whom the United States held in Japan pursuant to an indictment by a Japanese court charging that he had killed a Japanese civilian. *Id.* at 525-26. Under a treaty between the two nations,

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[7] While *Reid* held that a U.S. civilian could not constitutionally be tried by court-martial, a member of the U.S. military may be tried by court martial, regardless of whether the offense committed is connected to that member's service to the military. *See Solorio v. United States*, 483 U.S. 435, 436 (1987) (overruling *O'Callahan v. Parker*, 395 U.S. 258 (1969)).

the United States agreed to waive its jurisdiction to try Girard and deliver him "to the Japanese authorities for trial." *Id.* at 526-29. However, before the United States could deliver him, Girard filed for a writ with the D.C. district court. *Id.* at 526, 543. The Supreme Court granted certiorari and exercised jurisdiction to deny the writ on the merits, concluding that the treaty validly authorized Japan to exercise jurisdiction. *Id.* at 526-30.

C. From the 1960s to the Present

In 1973, in *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973), the Court revisited its construction of 28 U.S.C. § 2241 in *Ahrens* requiring the physical presence of a petitioner as a predicate to statutory jurisdiction. In *Braden*, a prisoner serving an unrelated sentence in an Alabama prison brought a habeas petition in Kentucky against a detainer issued by a Kentucky court. *Id.* at 485-87. The Supreme Court concluded that § 2241's provision for district courts to grant habeas writs "within their respective jurisdictions" need not be read, as it had been in *Ahrens*, to invariably require "the prisoner's presence within the territorial confines of the district . . . ." 410 U.S. at 495. Rather, jurisdiction was proper in the Kentucky district court because the writ of habeas corpus "does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody." *Id.* at 494-95 (citing *Wales v. Whitney*, 114 U.S. 564, 574 (1885)).

In light of intervening congressional and jurisprudential developments, the *Braden* Court

concluded that traditional principles of venue would alleviate the forum-shopping concerns that animated the *Ahrens* decision and that the Court could "no longer view that decision as establishing an inflexible jurisdictional rule, dictating the choice of an inconvenient forum even in a class of cases which could not have been foreseen at the time of our decision." *Id.* at 499-500. Among the jurisprudential developments cited in *Braden* were the Court's decisions involving American habeas petitioners in custody outside of the United States (and the territory of any federal district court) where the Court "held, if only implicitly, that the petitioners' absence from the district does not present a jurisdictional obstacle to the consideration of the claim." *Id.* at 498 (citations omitted).

This Court's more recent decision in *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), reaffirmed the "immediate custodian" rule of *Wales*, which interpreted the provisions of the habeas statute then applicable as contemplating "'a proceeding against some person who has the *immediate custody* of the party detained . . . .'" *Id.* at 435 (quoting *Wales*, 114 U.S. at 574). In particular, *Padilla* recognized that in "core challenges" to present, physical confinement (as distinct from the type of challenge at issue in *Braden*), a habeas petitioner must name his "immediate custodian"—and not some distant official or abstract entity—as his respondent. *Id.* at 436, 438-39. Nevertheless, the *Padilla* Court noted that jurisdiction for those outside the United States posed a different issue: "We have long implicitly recognized an exception to the immediate custodian rule in the military context where an American

citizen is detained outside the territorial jurisdiction of any district court." *Id.* at 436 n.9.

In *Rasul v. Bush*, 542 U.S. 466 (2004), decided the same day as *Padilla*, the Court held that non-citizens detained by the U.S. military at the Guantánamo Bay Naval Base ("Guantánamo") in Cuba were able to invoke the statutory jurisdiction of the federal courts. *Id.* at 470-71, 485. The *Rasul* petitioners were foreign nationals captured abroad and held as "enemy combatants" by U.S. military forces at Guantánamo—"a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'" *Id.* at 475 (footnote omitted). Because *Braden* "overruled the statutory predicate to *Eisentrager's* holding"—namely, the *Ahrens* Court's construction of the habeas statute—the Court reasoned that "*Eisentrager* plainly does not preclude the exercise of § 2241 jurisdiction over petitioners' claims." *Id.* at 479 (footnote omitted). Further, the Court concluded that because the habeas statute does not distinguish between American citizens and foreign nationals held in federal custody and because the respondents in *Rasul* conceded that the habeas statute would create jurisdiction for the claims of an American citizen held at Guantánamo, "[a]liens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under § 2241." *Id.* at 481; *cf. Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2769 n.15 (2006) (exercising the jurisdiction upheld in *Rasul* over petitions of non-citizens detained by U.S. forces in Guantánamo and holding, *inter alia*, that the Detainee Treatment Act of 2005, Pub. L. 109-148, 119 Stat. 2739 (the "DTA"), did not deprive

federal courts of jurisdiction to hear the previously pending habeas petition of a foreign national held as an "enemy combatant" at Guantánamo).

As efforts to combat terrorism and illegal immigration increasingly occupied Congress in the 1990s and following the events of September 11, 2001, the Court addressed several legislative amendments to the habeas statute, seeking to reconcile those amendments with the requirements of the Suspension Clause. For example, in the summer of 2001, the Court held in *INS v. St. Cyr*, 533 U.S. 289 (2001), that neither the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, nor the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546, deprived federal courts of jurisdiction to review under § 2241 the habeas petition of a permanent resident alien challenging aspects of his removal proceedings. 533 U.S. at 293, 297, 314. The Court explained that the writ "has always been available to review the legality of Executive detention," *id.* at 305 (collecting cases), and habeas jurisdiction has been "regularly invoked on behalf of noncitizens, particularly in the immigration context," *id.* (citations omitted). The Court declined to construe the amendments as precluding habeas jurisdiction in possible contravention of the Suspension Clause, because doing so "would give rise to substantial constitutional questions." *Id.* at 300.

In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality), the Court considered the legality of the Government's detention of indefinite duration of a

U.S. citizen as an "enemy combatant," where the detainee had been seized abroad before being transferred to Guantánamo and then to a naval facility within the United States. *Id.* at 509-10. A majority of Justices agreed with the respondent that Congress had sanctioned the detention in question under 2001 legislation. *Id.* at 517 (plurality); *id.* at 587 (Thomas, J., dissenting). A different majority concluded that such authorization did not preclude judicial review of the detention. *Id.* at 536-37 (plurality); *id.* at 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment). As Justice O'Connor stated, any threats to military operations posed by independent review did not trump "a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator." *Id.* at 535 (plurality). Absent suspension of the habeas corpus writ, "a citizen detained as an enemy combatant is entitled to this process." *Id.* at 537 (plurality). While disagreement existed as to the appropriate scope and nature of any habeas review, it was thus undisputed by the parties—and by a majority of the Court—that the federal courts had jurisdiction to hear the habeas petition. *See id.* at 525 (plurality); *id.* at 541 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

II. This Court's Jurisprudence Identifies Key Factors That Affect the Availability of Habeas Corpus

Read together, the cases surveyed in Part I demonstrate that this Court has considered a variety of factors relevant in determining whether the writ

of habeas corpus and accompanying relief are available in specific cases of federal executive detention: (1) the status of the detainee (e.g., U.S. citizen or foreign national, civilian or enemy); (2) the location of the detention and of the custodian; (3) the source of the authority for detention (including the kind and nature of the tribunal, court or person authorizing detention); (4) the court in which the petitioner initiated the habeas petition; and (5) the statutory or constitutional jurisdictional predicates upon which the petitioner relied.

The Court has not focused on the same factors in every case nor always weighted all factors equally. Moreover, the Court has not addressed these factors using the same interpretive methodology in every case. At times, the decisions can be read to rely on textualism, whereas other decisions focus more on the common law history of the writ, its function as a structural restraint on the government's conduct, or the writ's fundamental purposes.[8] Taken as a whole, the Court's jurisprudence indicates that the Court has consistently relied upon the intersection of different factors, and not upon any one factor alone, in deciding whether to exercise its habeas jurisdiction in each case.

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[8] *See, e.g.*, William F. Duker, *A Constitutional History of Habeas Corpus* 225-86 (1980); Calabresi & Lawson, *supra* note 3, at 1003-09; Paust, *supra* note 5, at 19, 25; Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 981-91 (1998).

A. Status of the Detainee in Correlation with Other Key Factors

A number of this Court's habeas decisions can best be understood in light of the interaction between the petitioner's citizenship status and the location of his or her detention. When petitioners are held within the territorial jurisdiction of the United States, the Court has exercised its habeas jurisdiction to review the detentions of both citizens and foreign nationals. *See Hamdi*, 542 U.S. at 525 (plurality); *see also, e.g.*, *St. Cyr*, 533 U.S. at 314; *Kaine*, 55 U.S. (14 How.) at 117 (plurality). However, some of this Court's post-World War II decisions indicate that when petitioners are detained abroad, the availability of habeas relief may be more expansive for Americans than for foreigners. *See, e.g.*, *Rasul*, 542 U.S. at 497 (Scalia, J., dissenting) ("The constitutional doubt that the Court of Appeals in *Eisentrager* had erroneously attributed to the lack of habeas for an alien abroad might indeed exist with regard to a *citizen* abroad—justifying a strained construction of the habeas statute, or (more honestly) a determination of constitutional right to habeas.").

Other decisions involved a confluence of factors including citizenship status, location, and the source of authority for detention. For example, in a number of cases in which citizens challenged confinement abroad, the Court reached the merits of their habeas petitions without questioning its own or the lower federal courts' jurisdiction to do so. This was so whether the challenged detentions were authorized by purely U.S. authority, *see Burns*, 346 U.S. at 138-39 (plurality), purely foreign authority,

see Wilson, 354 U.S. at 526-529, or by agreement with other nations, *see, e.g.*, *Reid*, 354 U.S. at 15 & n.29, 41 (plurality); *cf. Madsen*, 343 U.S. at 344 & n.3, 370-71.

In other cases, a different group of factors—citizenship status and the basis of jurisdiction invoked—was considered by the Court in determining whether to issue the writ. For example, when U.S. citizens have sought an original writ from this Court without previously filing in a lower court, the Court has declined to entertain their petitions. *See, e.g.*, *Bush*, 336 U.S. at 971 (denying leave to file an original petition); *Betz*, 329 U.S. at 672 (same).

The Court's case law is less clear about how citizenship status interacts with other factors when non-citizens are held outside the territorial United States. In *Hirota*, the petitioners were foreign nationals held in Japan and were sentenced by an international military tribunal; these were among the "foregoing circumstances" the Court enumerated before holding that "the courts of the United States have no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed" on the petitioners. 338 U.S. at 198. In *Eisentrager*, which expressly precluded habeas corpus for enemy aliens convicted by military tribunals and detained overseas, the Court did not specify whether its holding rested on the petitioners' status as "enemy aliens," their extraterritorial situs, the statutory provisions involved or some combination of all three factors. *See* 339 U.S. at 777. More recently, however, a majority of this Court concluded in *Rasul* that § 2241 reaches even non-

citizens held outside the United States in an area over which the United States exercises plenary but not sovereign control, *see* 542 U.S. at 479.[9]

B. The Source of the Detention Authority

The nature of the authority behind a detention—be it Executive, judicial, military or otherwise—has proved to be an important factor in determining when habeas jurisdiction will be available.

1. Executive Detention Absent Judicial or Military Proceedings

This Court has recognized that, "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *St. Cyr*, 533 U.S. at 301. In particular, the "'historic purpose of the writ has been to relieve detention by executive authorities without judicial trial.'" *Rasul*, 542 U.S. at 474 (quoting *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring)). Thus, for instance,

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[9] Section 7(a) of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, adds an express statutory limit to the habeas corpus jurisdiction of the United States in cases brought by certain non-citizens detained as "enemy combatants," or awaiting such determination. The constitutionality of this provision as applied to non-citizens held at Guantánamo is presently before this Court in *Boumediene v. Bush* and *Al Odah v. United States*, Nos. 06-1195, 06-1196 (U.S. argued Dec. 5, 2007).

foreign nationals in *Rasul* and a U.S. citizen in *Hamdi* were detained without trial by the U.S. military and were permitted to invoke federal habeas jurisdiction to challenge their detention. *See Hamdi*, 542 U.S. at 509-11; *Rasul*, 542 U.S. at 470-71, 485.

2. Military Tribunals

By the close of the Civil War, it had become clear that the habeas writ could be used to challenge detentions pursuant to the convictions of military tribunals. *See, e.g.*, *Yerger*, 75 U.S. (8 Wall.) at 103; *Milligan*, 71 U.S. (4 Wall.) at 118. A military tribunal's jurisdiction and compliance with statutory procedures may be reviewed by the federal courts. *See, e.g.*, *Milligan*, 71 U.S. (4 Wall.) at 118-27; *see also Reid*, 354 U.S. at 40-41 (plurality); *Quirin*, 317 U.S. at 24-25. Further, convictions do not bar habeas jurisdiction; indeed, this Court has, on habeas review, granted post-conviction relief to American citizens convicted by U.S. military tribunals abroad on the ground that the proceedings before those tribunals were unconstitutional. *See Reid*, 354 U.S. at 3-5; *Toth*, 350 U.S. at 13-14 n.3, 23. Thus far, however, absent statutory authorization, military tribunals' judgments and sentences have not been susceptible to direct review. *See, e.g.*, *Burns*, 346 U.S. at 139-40 (plurality); *Yamashita*, 327 U.S. at 8-9; *Vallandigham*, 68 U.S. (1 Wall.) at 253; *Dynes*, 61 U.S. (20 How.) at 81.

3. Foreign Tribunals

While this Court has seldom grappled with the federal courts' authority to review decisions of foreign or international tribunals—either in advance of any actual proceedings or, less frequently, after decision—the Court has sometimes recognized limits on the challenges that may be presented to the proceedings of such courts. For example, this Court has held that where extradition is contemplated pursuant to a congressionally implemented treaty and unless the treaty provided otherwise, a petitioner (even one who is a U.S. citizen) could not challenge his surrender for trial under foreign law on the basis that the foreign proceedings will not guarantee him the same procedural protections as the Constitution. *Neely*, 180 U.S. at 123; *see also, e.g.*, *Wilson*, 354 U.S. at 529-30. *Neely*, however, indicates that there may be procedural requirements with which the foreign proceedings must comply in order for such a transfer to be validated. *See* 180 U.S. at 123. Given the development in due process decisions since that ruling, individuals detained in U.S. custody may be able to seek habeas review prior to their transfer to the custody of other nations where they could be subjected to grave forms of injury.

What this Court's decisions have established thus far is that a petitioner, whether or not a citizen, may use habeas to challenge the constitutional validity of the statutory scheme pursuant to which he is being transferred to foreign authorities, and to ensure that the transfer proceedings themselves and any U.S. detention prior to transfer are authorized

by statute. *See Kaine*, 55 U.S. (14 How.) at 103-04, 108-09 (plurality).

C. Statutory and Constitutional Predicates for Habeas Jurisdiction

In cases from *McCardle* and *Yerger* in the nineteenth century to *Rasul* in the twenty-first, this Court has consistently attended to the statutory predicate invoked and to the level of the court in which the habeas petition was first filed in determining whether it has jurisdiction. Successive congressional revisions have impacted these determinations. *Compare, e.g.*, *McCardle*, 74 U.S. (7 Wall.) at 508-14 (no jurisdiction for appeal of lower court's denial of habeas after repeal of 1867 statutory provision), *with Yerger*, 75 U.S. (8 Wall.) at 100-02 (jurisdiction under Judiciary Act for original habeas petition in Supreme Court seeking review of denial of habeas petition in lower court). The Court has not read a repeal of one form of statutory habeas jurisdiction to preclude another, absent a specific directive from Congress. *See, e.g.*, *St. Cyr*, 533 U.S. at 298-99 & n.10.

When petitioners have initiated habeas proceedings in this Court, the Court's construction of its own jurisdiction has also been an important factor. *Compare Bollman*, 8 U.S. (4 Cranch) at 100-01 (appellate jurisdiction for habeas review of lower court's order committing prisoner to jail), *with Vallandigham*, 68 U.S. (1 Wall.) at 251-54 (no jurisdiction, including through habeas, for review of

detention pursuant to military commission sentence on which no lower court had previously passed).[10]

III. Under This Court's Precedents, the Key Factors Barred Habeas Availability in *Hirota* and Require it for Omar and Munaf

The preceding overview shows *Hirota* to be but one of a series of cases that delineate the boundaries of habeas jurisdiction by reference to a combination of key factors. As the Court stated in *Hirota*, its judgment was predicated upon "the foregoing circumstances"; the Court did not indicate that any single factor was dispositive. The combination of these "circumstances" is thus critical to understanding the Court's conclusion that the federal courts had "no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners." 338 U.S. at 198.

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[10] Although this Court has only granted a handful of original habeas petitions since *Yerger* (and none since 1925), it has recognized the continuing availability of such an atypical procedure as recently as last Term. *See, e.g., Boumediene v. Bush*, 127 S. Ct. 1478, 1478 (mem.) (Stevens & Kennedy, JJ., respecting the denial of certiorari) (noting the potential availability of original relief "[i]f petitioners later seek to establish that the Government has unreasonably delayed proceedings under the Detainee Treatment Act of 2005, . . . or some other and ongoing injury" (citation omitted)), *reh'g granted, order vacated by* 127 S. Ct. 3078 (2007); *see also Padilla v. Hanft*, 547 U.S. 1062, 1063 (2006) (mem.) (Kennedy, J., concurring in the denial of certiorari).

The first of the "circumstances" was that the *Hirota* petitioners were not American citizens but foreign nationals. The second was that they were not detained within the territories of the United States. While in and of itself being a foreign national does not prevent a petitioner from seeking a writ of habeas corpus, *see, e.g.*, *St. Cyr*, 533 U.S. at 26, the Court thus far has not permitted aliens held outside the United States or areas over which the United States has plenary control to seek habeas relief, at least when they have no connection to the United States, *see, e.g.*, *Eisentrager*, 339 U.S. at 777-81.

A third "circumstance" was that the *Hirota* petitioners sought to attack their convictions and sentences by an international military tribunal. *Hirota* thus fits within this Court's decisions holding that federal courts do not have habeas jurisdiction to review the judgment of a military tribunal so long as it is properly constituted and has adhered to appropriate procedural rules. *See, e.g.*, *Yamashita*, 327 U.S. at 5-9. Although these rulings involved U.S. military tribunals, their holdings indicate that a federal court would be no less reluctant to review the judgment of a duly constituted foreign or international military tribunal.

A fourth "circumstance" referred to in *Hirota* was that the petitioners filed for an original writ, and therefore were required to satisfy either the Court's original or appellate jurisdiction under Article III, section 2, clause 2. Petitions for original habeas writs were denied by the Court before and

after *Hirota* as a matter of course. *See, e.g.*, *Bush*, 336 U.S. 971 (mem.); *Betz*, 329 U.S. 672 (mem.).

In contrast, the circumstances of Omar and Munaf do not fall within the parameters of *Hirota*. They are instead consistent with cases where the Court has found that habeas jurisdiction exists.

First, Omar and Munaf are American citizens. Joint Appendix ("J.A.") 32, 110-11. The Supreme Court has never held that the federal courts lack jurisdiction to consider the claims presented in a habeas petition of a U.S. citizen detained abroad by the executive. To the contrary, since 1953, the Court has repeatedly approved of the exercise of jurisdiction over the habeas petitions of such Americans. *See, e.g.*, *Reid*, 354 U.S. at 3-4 (plurality); *Toth*, 350 U.S. at 23; *Burns*, 346 U.S. at 146 (plurality).

Second, Omar and Munaf are detained by U.S. forces that are working in conjunction with other nations as a part of the Multinational Force-Iraq ("MNF-I"), whose operations are authorized by a U.N. resolution. J.A. 42-43, 111. In other instances when U.S. citizens held by the U.S. military working with other nations or pursuant to international authority have filed habeas petitions, the Court has exercised jurisdiction to consider those petitions. *See, e.g.*, *Wilson*, 354 U.S. at 526-30.

Third, Omar and Munaf filed their habeas petitions seeking review of their detention by U.S. forces prior to the judgment of any foreign tribunal. Both remain detained, although Munaf, after filing

for habeas relief, was tried, convicted and sentenced to death by an Iraqi court. *See* J.A. 14, 27-30, 33, 54, 88, 104-06, 111-12. Where, as here, the United States intends to transfer an individual in U.S. custody to a foreign sovereign, the Court's precedents indicate that the individual may properly invoke habeas jurisdiction to challenge that detention and the constitutional and statutory bases for the proposed transfer. *See, e.g.*, *Neely*, 180 U.S. at 123. Whether a foreign court has exercised process over the petitioner after the petition is filed is not relevant to the exercise of habeas jurisdiction. *See, e.g.*, *Wilson*, 354 U.S. at 526-30.

Fourth, neither Omar nor Munaf seek an original writ from this Court; both have duly filed petitions in the D.C. district court, invoking that court's jurisdiction under § 2241. J.A. 27, 104. *Compare Hirota*, 338 U.S. at 198.

CONCLUSION

As set forth above, different combinations of key factors have been central to the Court's determinations concerning jurisdiction in habeas cases. Under the circumstances presented here, Omar and Munaf are among many other habeas petitioners whom this Court's rulings have recognized may invoke the jurisdiction of the federal

courts "to review the legality of Executive detention." *St. Cyr*, 533 U.S. at 305.

Respectfully submitted,

DANIEL F. KOLB
Counsel of Record
BRIAN S. WEINSTEIN
WILLOW D. CRYSTAL
DANIEL J. SCHWARTZ
KEVIN P. HANCOCK
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, NY 10017
(212) 450-4000

Attorneys for Amici Curiae

Of Counsel:

JUDITH RESNIK
127 Wall Street
New Haven, Connecticut 06511

STEPHEN I. VLADECK
4801 Massachusetts Avenue, NW
Washington, D.C. 20016

FEBRUARY 2008

Jenny S. Martinez
Associate Professor of Law and
Justin M. Roach, Jr. Faculty Scholar
Stanford Law School

Martha Minow
Jeremiah Smith Jr. Professor
Harvard Law School

Trevor W. Morrison
Associate Professor of Law
Cornell Law School

Edward A. Purcell, Jr.
Joseph Solomon Distinguished Professor
New York Law School

Judith Resnik
Arthur Liman Professor of Law
Yale Law School

Lauren Robel
Dean and Val Nolan Professor
Indiana University School of Law

Caprice L. Roberts
Professor of Law
West Virginia University

Kermit Roosevelt
Professor of Law
University of Pennsylvania Law School

Andrew M. Siegel
Associate Professor of Law
Seattle University School of Law

APPENDIX A
LIST OF *AMICI CURIAE*
PROFESSORS OF CONSTITUTIONAL LAW AND OF THE FEDERAL COURTS*

Bruce Ackerman
Sterling Professor of Law and Political Science
Yale University

Susan Bandes
Distinguished Research Professor
DePaul University College of Law

Robert N. Clinton
Foundation Professor of Law
Sandra Day O'Connor College of Law
Arizona State University

Norman Dorsen
Stokes Professor of Law and
Counselor to the President
New York University

Amanda Frost
Associate Professor of Law
American University College of Law

Sylvia A. Law
Elizabeth K. Dollard Professor of Law, Medicine and Psychiatry
New York University Law School

---

* Affiliations of *amici* are listed for identification purposes only.

Jenny S. Martinez
Associate Professor of Law and
Justin M. Roach, Jr. Faculty Scholar
Stanford Law School

Martha Minow
Jeremiah Smith Jr. Professor
Harvard Law School

Trevor W. Morrison
Associate Professor of Law
Cornell Law School

Edward A. Purcell, Jr.
Joseph Solomon Distinguished Professor
New York Law School

Judith Resnik
Arthur Liman Professor of Law
Yale Law School

Lauren Robel
Dean and Val Nolan Professor
Indiana University School of Law

Caprice L. Roberts
Professor of Law
West Virginia University

Kermit Roosevelt
Professor of Law
University of Pennsylvania Law School

Andrew M. Siegel
Associate Professor of Law
Seattle University School of Law

Carl Tobias
Williams Professor
School of Law, University of Richmond

Stephen I. Vladeck
Associate Professor of Law
American University Washington College of Law

Larry Yackle
Basil Yanakakis Faculty Research Scholar
Professor of Law
Boston University School of Law

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Nos. 06-1666 and 07-394

IN THE
Supreme Court of the United States

PETE GEREN, SECRETARY OF THE ARMY, ET AL.
Petitioners,

v.

SANDRA K. OMAR & AHMED S. OMAR,
AS NEXT FRIENDS OF SHAWQI AHMAD OMAR
Respondents.

MOHAMMED MUNAF, ET AL.
Petitioners,

v.

PETE GEREN, SECRETARY OF THE ARMY, ET AL.
Respondents.

On Writs of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

BRIEF OF THE ASSOCIATED PRESS, THE COMMITTEE TO PROTECT JOURNALISTS, THE INTERNATIONAL FEDERATION OF JOURNALISTS, PEN AMERICAN CENTER, AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS IN *MUNAF v. GEREN*, No. 06-1666, AND IN SUPPORT OF RESPONDENTS IN *GEREN v. OMAR*, No. 07-394

PAUL M. SMITH*
KENYANNA SCOTT
JOSHUA A. BLOCK
ELISABETH GENN
JENNER & BLOCK LLP
919 Third Avenue,
New York, NY 10022
(212) 891-1600

*Counsel of Record

Attorneys for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

The Associated Press ("AP") is the essential global news network, delivering fast, unbiased news from every corner of the world to all media platforms and formats. Founded in 1846, AP today is the largest and most trusted source of independent news and information. On any given day, more than half the world's population sees news from AP.

The Committee to Protect Journalists ("CPJ") is an independent, non-profit organization that promotes press freedom worldwide by defending the right of journalists to report the news without fear of reprisal.

The International Federation of Journalists ("IFJ") is the world's largest organization of journalists, representing around 600,000 members in 120 countries. The IFJ promotes international action to defend press freedom and social justice through strong, free, and independent trade unions of journalists.

PEN American Center ("PEN") is a human rights and literary association based in New York. Committed to the advancement of literature and the unimpeded flow of ideas and information, PEN fights for freedom of expression; advocates on behalf of

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. Letters of consent from the parties have been submitted to the Clerk's office along with this brief.

writers harassed, imprisoned, and sometimes killed for their views; and fosters international exchanges, dialogues, discussions, and debates.

The Reporters Committee for Freedom of the Press (the "Reporters Committee") is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance, and research in First Amendment and freedom of information litigation in state and federal courts since 1970.

INTRODUCTION AND SUMMARY

In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), a coalition of humanitarian organizations and associations of international journalists filed an *amicus* brief in support of petitioner Yaser Hamdi, arguing that "[g]iven the conditions in which relief workers and journalists are forced to operate, they face a real risk of mistaken or ill-founded military detention." *Br. for AmeriCares, et al., Hamdi v. Rumsfeld*, 542 U.S. 547 (2004) (No. 03-6696) *available at* 2004 WL 575744, at *13. Citing that brief, this Court's plurality opinion in *Hamdi* noted that "the risk of erroneous deprivation of a citizen's liberty in the absence of sufficient process here is very real," and held that due process requires, at a minimum, a hearing before a neutral decisionmaker at which "the errant tourist, embedded journalist, or local aid worker has a chance to prove military error." *Hamdi*, 542 U.S. at 530, 534 (plurality opinion).

Amici in this case are media organizations, international journalist associations, and non-governmental organizations dedicated to freedom of the press. Although *Geren v. Omar* and *Munaf v. Geren* arise in a different legal context than *Hamdi*, the practical implications of the Executive's assertion of unreviewable detention authority are the same. Journalists and other civilians are routinely present in areas of military conflict. Indeed, military protocols recognize that journalists will often be on the ground before troops arrive. Similarly, the Geneva Conventions anticipate that journalists will be on or near the battlefield and provide those journalists with protections as civilians or prisoners of war. Reporters and war correspondents thus face a substantial risk of being detained erroneously in the course of executing their professional responsibilities.

The ongoing conflict in Iraq demonstrates that such erroneous detentions are not merely a hypothetical possibility. More journalists have died in the course of carrying out their professional duties in Iraq than during any conflict in the 20th Century. While insurgents, kidnappers, and masked gunmen are largely responsible for the dangers that journalists confront in Iraq, the journalists also face significant risks as a result of mistaken identity. In the fog of war, U.S. troops have sometimes confused journalists with Iraqi insurgents. U.S. forces have detained over a dozen journalists for months at a time without any charges. Many more journalists and media support workers have been detained

without charges for shorter intervals and then released.

In *Hamdi*, this Court recognized the substantial risk of erroneous detention and insisted on due-process protections to preserve "core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator." *Hamdi*, 542 U.S. at 535 (plurality opinion). Yet the government's interpretation of *Hirota v. MacArthur*, 338 U.S. 197 (1948), would eviscerate *Hamdi* and insulate many, if not most, of the military's future detention activities from any judicial review. The government's concerns about deference to military operations and international comity can and should be taken into account in fashioning the scope of the relief available to detainees, but these policy concerns should not be engrafted onto Article III as a rigid jurisdictional bar. A system of unchecked and unreviewable detention would have devastating consequences for the many journalists and other civilians in Iraq and in future areas of military conflict.

ARGUMENT

I. Journalists and War Correspondents Are Routinely Present in Areas of Military Conflict.

As a fixture of modern warfare, journalists and war correspondents will often be present in a foreign theater of war without being "part of or supporting forces hostile to the United States or coalition partners." *Hamdi*, 542 U.S. at 527 (plurality opinion) (quotation marks omitted). The government's claims of unreviewable authority to

detain and punish will have dangerous implications for these journalists reporting from Iraq and from future areas of conflict.

Journalists have reported directly from the battlefield since at least the Crimean War in 1853.[2] By 1909, war correspondents had become such a regular presence in war zones that the regulations annexed to the Hague Conventions incorporated special provisions ensuring their safety.[3] During World War II, about 150 war correspondents landed in Normandy to cover the Allied Forces' D-Day

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[2] *See generally* Philip Knightley, *The First Casualty—The War Correspondent as Hero & Myth-Maker from the Crimea to Iraq* (2004).

[3] *See* Hague Regulations Respecting the Laws and Customs of War on Land, art. 13, Annex to Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907 (providing that "newspaper correspondents and reporters . . . are entitled to be treated as prisoners of war, provided they are in possession of a certificate from the military authorities of the army which they were accompanying"). In their current form, the protections for war correspondents are codified in Article 4 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War Aug. 12, 1949, [1955] 6 U.S.T. 3316, T.I.A.S. No. 3364 ("Third Geneva Convention"), which protects all authorized war correspondents as prisoners of war, whether or not the correspondent actually possesses an authorization card at the time of capture. Journalists who are unaffiliated with a particular nation's armed forces are protected as civilians under Common Article 3 of the Geneva Conventions and under separate provisions in Additional Protocol I to the Geneva Conventions of 12 August 1949 (1977) ("Protocol 1").

invasion in 1944.[4] For the invasion of Iraq in 2003, that number ballooned to 600 journalists, who worked as embedded reporters with Multi-National Force ("MNF") troops on behalf of a diverse range of American and international news organizations.[5] An additional 1,445 journalists worked as "unilaterals" traveling on their own and working without any affiliation with MNF troops.[6]

By reporting from the frontlines, these journalists put their lives at risk to serve important public interests. Battlefield journalists provide the public with the information they need to engage in the "'uninhibited, robust, and wide-open'" debate and discussion contemplated by the First Amendment. *Lamont v. Postmaster Gen. of the U.S.*, 381 U.S. 301, 307 (1965) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). The public relies on prompt and accurate war reporting to apprise them of events unfolding half a world away and to inform them about the actions that the military takes in their name. "Military legal obligations include accountability to the civilian leadership and protection of the Constitution, including the First Amendment. Press coverage of military operations

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[4] *See* Army Field Manual 46-1, *Public Affairs Operations* 24 (1997), *available at* http://www.globalsecurity.org/military/library/policy/army/fm/46-1/46_1.pdf.

[5] Christopher Paul & James J. Kim, RAND Corp., *Reporters on the Battlefield: The Embedded Press System in Historical Context* xiii (2004).

[6] *Id.* at 55.

allows confirmation that the military is acting in accordance with American values and laws."[7]

Indeed, because the Executive enjoys the greatest latitude in matters of foreign affairs, the press serves a particularly critical function when reporting on wartime activities. As Justice Stewart explained:

> [T]he only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment.

N.Y. Times Co. v. United States, 403 U.S. 713, 728 (1971) (Stewart, J., concurring).[8]

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[7] *Id.* at 22; *see also* U.S. Joint Chiefs of Staff, Joint Pub. 3-61, *Public Affairs* at I-7 (2005) ("Commanders have an obligation to inform the American public about their nation's military."), *available at*

http://www.dtic.mil/doctrine/jel/new_pubs/jp3_61.pdf.

[8] Justice Stewart's views were not unique. First Amendment scholar Zechariah Chaffee wrote that the role of the press "is especially important in wartime." Zechariah Chafee, *Free Speech in the United States* 33 (1941).

> Truth can be sifted out from falsehood only if the government is vigorously and constantly cross-examined, so that the fundamental issues of the struggle may be clearly defined, and the war may not be diverted to improper ends, or conducted with an undue sacrifice, of

Current military policy recognizes the indispensable role that the press plays in informing the public and ensuring that the war effort retains democratic legitimacy.[9] The current policy of the Department of Defense is to provide the media with "long-term, minimally restrictive access to U.S. air, ground, and naval forces" by "embedding" journalists

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life and liberty, or prolonged after its just purposes are accomplished.

Id.; see also N.Y. Times, 403 U.S. at 717 (Black, J., concurring) (discussing role of press when soldiers are sent "off to distant lands to die of foreign fevers and foreign shot and shell").

[9] The military's past attempts to restrict press access during the invasions of Grenada and Panama provoked strong criticism from both the civilian leadership and the Pentagon itself. *See* 129 Cong. Rec. 299,04 (1983) (Senate resolution condemning denial of press access in Grenada); *A Statement of Principle on Press Access to Military Operations*, N.Y. Times, Jan. 11, 1984, at A10 (statement of major media organizations in response to restrictions on press access in Grenada); Chairman of the Joint Chiefs of Staff Media Relations Panel, Final Report (1984) ("The American people must be informed about the United States' military operations . . . . [T]he panel believes it is essential that the U.S. news media cover U.S. military operations to the maximum degree possible consistent with mission security and the safety of U.S. forces"); Fred S. Hoffman, *Review of the Panama Pool Deployment, December 1989*, Memorandum for Correspondents, The Pentagon, Washington, DC, March 1990.

with U.S. troops.[10] In adopting the embed policy, the Pentagon noted that "[o]ur ultimate strategic success in bringing peace and security to this region will come in our long-term commitment to supporting our democratic ideals. We need to tell the factual story—good or bad—before others seed the media with disinformation and distortions . . . ."[11] The Army Field manual similarly warns "that the perception of America's Army and how it conducts its operations can be as important to the Army's success as actual combat."[12]

In addition to "embedded" reporters, other journalists will often be present in areas of military conflict or dispersed among civilian populations. The Army Field Manual on Public Affairs Operations advises soldiers that "[t]here is no question that the news media will cover future military operations, and in most cases will be on the ground before American forces arrive."[13] Members of the various Judge Advocate General Corps are also trained to expect frequent interactions between the military

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[10] *See* U.S. Dep't of Defense, *Public Affairs Guidance on Embedding Media* § 2A (2003) *available at* *http://www.defenselink.mil/news/Feb2003/d20030228pag.pdf* Even more broadly, commanders are encouraged to "organize for and facilitate access of national and international media to U.S. forces, including those engaged in combat operations." *U.S. Joint Chiefs of Staff, Joint Pub. 3-61, supra* note 7, at III-23.

[11] *Guidance on Embedding Media, supra* note 10, at § 2A.

[12] Army Field Manual 46-1, *supra* note 4 at 12 (1997).

[13] *Id.* at 24.

and the media. A recent article by two Air Force JAG officers advises that "[t]he reality of the world in which judge advocates find themselves today is such that they must expect and plan for encountering large numbers of news media representatives in all phases of deployment—including actual hostilities."[14]

In evaluating the government's jurisdictional arguments, this Court should similarly anticipate that the government's detention policies in Iraq and in future areas of conflict will impact journalists and other civilians. As this Court recognized in *Hamdi*, journalists and war correspondents face a "very real" risk of erroneous military detention in the absence of sufficient due-process protections. *See Hamdi*, 542 U.S. at 530 (plurality opinion).

II. The Current War in Iraq Has Been Particularly Dangerous for Journalists.

The current war in Iraq illustrates the enormous dangers that journalists face in carrying out their professional responsibilities. The ongoing conflict has resulted in more journalist deaths than any conflict in the 20th Century, according to figures compiled by the Committee to Protect Journalists and the Freedom Forum. Almost twice as many journalists have died in the line of duty in Iraq than were killed in World War II or Vietnam. Reporting from the middle of an urban war zone, journalists—along with their translators and other media-support

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[14] Major Lisa L. Turner & Major Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 Air Force L. Rev. 1, 12 (2001).

workers—face harassment and attacks from Iraqi insurgents, local government officials, kidnappers, and masked gunmen. Journalists have been caught in the crossfire of terrorist attacks, abducted as hostages, or murdered to silence their reporting. *See* Sam Dagher, *Iraqi Media Brave Assault From All Sides*, Christian Science Monitor, Dec. 20, 2007.[15]

The fog of war can also make it difficult for U.S. troops to distinguish between journalists and enemy forces. Journalists run the risk that their cameras will be mistaken for rocket-propelled grenades, *see* Sherry Ricchiardi, *Dangerous Assignment*, American Journalism Review Vol. 27, Issue 6 (Dec. 1, 2005); that they will be confused with Iraq insurgents, *see* Slobodan Lekic, *Reuters TV Soundman Killed in Baghdad, Cameraman Wounded*, AP Worldstream, Aug. 28, 2005; or that they will be suspected of being spies for foreign governments, *see Two Israeli Journalists Detained By U.S. Troops in Iraq*, AP Worldstream, Mar. 28, 2003.

U.S. troops have detained dozens of journalists and media-support workers in Iraq. While the majority of these journalists have been released within days without charges, over a dozen others have been held for months or as long as two years

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[15] More than 125 journalists and 50 media-support workers have been killed in Iraq since the war began in 2003. 32 journalists died in the year 2007 alone. Indeed, for the past five years in a row, more journalists have been killed in Iraq than in any other place in the world. Statistics collected by the Committee to Protect Journalists can be found at http://www.cpj.org/Briefings/Iraq/Iraq_danger.html.

without any charges or a meaningful hearing. These journalists include:

- Majed Hameed, a correspondent working for Reuters and Al-Arabiya, who was detained by U.S. troops for four months, from September 2005 to January 2006. *See* Eric Schmidt, *2,000 More M.P.'S Will Help Train the Iraqi Police*, N.Y. Times, Jan. 16, 2006, at A1 (noting that "Majed Hameed, an Iraqi reporter for the Al Arabiya network and Reuters, was released after four months in custody").

- Ali Mashhadani a freelance photographer for Reuters, who was detained for five months, from August 2005 to January 2006. *See News Agency Shocked By Imprisonment of Cameraman at Baghdad's Abu Ghraib*, AP Worldstream, Aug. 31, 2005.

- Samir Mohammed Noor, a television cameraman for Reuters, who was detained for eight months, from May 2005 to January 2006. *See U.S. Military Releases Freelance Cameraman from Prison in Iraq After 8 Months*, AP Worldstream, Jan. 22, 2006.

- Cyrus Kar, a freelance documentary filmmaker from the United States, who was detained for two months, from May 2005 to July 2005. *See* Tim Golden, *How a Trip to Film in Iraq Ended in a Military Jail Cell*, N.Y. Times, July 24, 2005.

- Abdul Ameer Younis Hussein, a cameraman for CBS news, who was detained for over a year, from April 2005 to April 2006. He continued to be detained by U.S. troops for months even after the Iraqi criminal court declined to prosecute him. *See* Robert F. Worth, *Detention of Iraqi Employees Angers Western News Media*, N.Y. Times Sept. 15, 2005, at A8. An Iraqi court eventually acquitted Hussein, citing a lack of evidence. *See* Vanessa Arington, *Iraqi Court Acquits CBS Cameraman for Lack of Evidence*, AP Worldstream, Apr. 5, 2006.

- Ammar Daham Naef Khalaf, a reporter from Agence France-Presse, who was detained by U.S. troops for six months, from April 2005 to October 2006. *See AP Photographer is Latest in a Long List of Detainees*, CPJ News Alert, Dec. 7, 2007, *available at* http://www.cpj.org/news/2007/mideast/iraq07dec07na.html.

The current detention of AP photographer Bilal Hussein has received the most extensive criticism from the American media and human-rights groups. Bilal Hussein is a Pulitzer Prize winning photojournalist who has worked with the AP since 2004. On April 12, 2006, Hussein was seized by U.S. forces in Ramadi, the capital of Iraq's Anbar province. He has been detained by U.S. troops in Iraq for nearly two years and, since early December 2007, has been undergoing an investigative hearing in an Iraqi court. *See* Tim Arango, *Case Lays Bare*

the Media's Reliance on Iraqi Journalists, N.Y. Times, Dec. 17, 2007; Lori Hinnant, *U.S. Detainees Sent To Iraqi Courts for Trial Face Legal System Mired in War's Chaos*, Associated Press, Dec. 6, 2007.

Given the important public interests they serve, the prolonged detention of journalists raises special concerns. When soldiers are forced to make split-second judgments in a chaotic and unpredictable urban conflict, it is inevitable that mistakes will sometimes be made. But because quick decisions must be made on the battlefield with little time for reflection, it is critical that detainees be promptly afforded a meaningful hearing before a neutral decisionmaker so they have an opportunity to demonstrate their civilian status or rebut the allegations against them.[16]

III. The Government's Proposed Jurisdictional Rule Would Pose an Unacceptably High Risk of Erroneous Detention in Current and Future Military Conflicts.

The government urges this Court to apply *Hirota v. MacArthur*, 338 U.S. 197 (1949), to bar all inquiry into military detentions by U.S. troops engaged as

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[16] As this Court noted in *Hamdi*, "initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to *continue* to hold those who have been seized." *Hamdi*, 542 U.S. at 534 (plurality opinion); *Cf. County of Sacramento v. Lewis*, 523 U.S. 833, 851 (1998) (noting the "different circumstances of normal pretrial custody and high-speed law enforcement" and explaining that government officials are held to a higher standard of care "when actual deliberation is practical").

part of an international military force or acting pursuant to the judgment of an international tribunal. These jurisdictional rules—which are nowhere expressed in the Constitution or any statute—would categorically foreclose all judicial relief for journalists and other civilians detained on the basis of mistaken identity or military error.

This Court has repeatedly rejected the government's attempts to insulate its military detentions and trials from judicial review. Most recently, when the government litigated the *Hamdi* case in the lower courts, it "submit[ted] that [courts] may not review at all its designation of an American citizen as an enemy combatant—that its determinations on this score are the first and final word." *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002). The Fourth Circuit correctly rejected that argument—both in its first appeal, and again when the *Hamdi* case returned to the Fourth Circuit in 2003. As Judge Wilkinson explained at the time: "The duty of the judicial branch to protect our individual freedoms does not simply cease whenever our military forces are committed by the political branches to armed conflict." *Hamdi v. Rumsfeld*, 316 F.3d 450, 464 (4th Cir. 2003), *vacated on other grounds*, 542 U.S. 507 (2004).

Yet the government now proposes a jurisdictional rule that would undercut *Hamdi* and effectively strip many future military detainees of all due-process protections. Whenever it is operating as part of an international alliance or in concert with a local government, the military would be able to detain and punish free of any judicial review.

Indeed, the vast majority of U.S. military activities already take place under the auspices of some international coalition or alliance. According to the Army Field Manual, the United States "normally pursues its national interests through multinational operations—those conducted by alliances and coalitions."[17] The President's National Security Strategy similarly makes clear that the United States will continue to use multinational coalitions to address the most pressing threats, especially global terrorism.[18] Such concerted multinational action is prevalent not only in areas of international armed conflict—such as Iraq today or Bosnia in the 1990s—but also in humanitarian, peace-building and peacekeeping operations spanning the globe. Today, U.S. forces are actively engaged as part of United Nations peacekeeping missions in areas including Liberia, Ethiopia and Eritrea, Haiti, Georgia, Kosovo, and the Middle East,[19] and they are deployed together with NATO allies in ongoing

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[17] Army Field Manual 1 ¶¶ 3-11 (2005), *available at* http://www.army.mil/fm1. A 2001 Report by the RAND Corporation likewise noted that "[t]he Army Vision recognizes explicitly that in future operations, Army forces will perform missions as part of a larger joint-combined-multinational force." Thomas S. Szayna, *et al.*, RAND Corp., *Improving Army Planning for Future Multinational Coalition Operations*, xi (2001).

[18] The National Security Strategy of the United States of America 14 (2006), *available at* http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf.

[19] United Nations Department of Peacekeeping Operations, Current Operations, Facts and Figures, *available at* http://www.un.org/Depts/dpko/dpko/.

operations and missions in Afghanistan, Kosovo, and Darfur.[20]

The government's interpretation of *Hirota* would block judicial review of military detentions for all these operations. The jurisdictional bar would strip judicial protection from journalists, war correspondents, medical personnel, humanitarian relief workers, United Nations staff, civilian engineers, and other civilians who could potentially be detained by U.S. troops. Civilians initially detained as a result of military error could be held permanently without charges or summarily transferred into the custody of local authorities who may provide little or no due process protection or engage in torture or other violations of humanitarian law.

The government's concerns about deference to military operations and international comity can and should be taken into account in fashioning the scope of the relief available to detainees. *Cf. In re Yamashita*, 327 U.S. 1, 30 (1946) (Murphy, J., dissenting); *Johnson v. Eisentrager*, 339 U.S. 763, 797 (1950) (Black, J., dissenting). But those concerns do not justify the creation of rigid jurisdictional rules that foreclose judicial review altogether. As this Court warned in *Hamdi*, "history and common sense teach us that an unchecked system of detention carries the potential to become a

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[20] The North Atlantic Treaty Organization, Current Operations and Missions, *available at* http://www.nato.int/.

means for oppression and abuse." *Hamdi*, 542 U.S. at 530 (plurality opinion). [21]

The government's proposed application of *Hirota* would create the same type of "unchecked system of detention" that *Hamdi* found constitutionally unacceptable. The practical consequences of such a jurisdictional bar would be devastating for journalists who may be detained while performing their professional duties in areas of military conflict. Nothing in Article III prevents the judiciary from hearing their claims.

CONCLUSION

For the foregoing reasons, the D.C. Circuit's decision in *Geren v. Omar*, No. 07-397, should be affirmed and its decision in *Munaf v. Geren*, No. 06-1666, should be vacated and remanded for further proceedings.

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[21] Because the habeas petitioners in this case are American citizens, this Court need not determine whether and to what extent non-U.S. citizens detained in Iraq are protected by federal habeas statutes and the Constitution. *See Rasul v. Bush*, 542 U.S. 466, 483 n.15 (2004); *Johnson v. Eisentrager*, 339 U.S. 763, 798 (1950) (Black, J., dissenting) (citing *Hirota v. MacArthur*, 338 U.S. 197, 199 (1949) (Douglas, J., concurring)).

Respectfully submitted,

PAUL M. SMITH*
KENYANNA SCOTT
JOSHUA A. BLOCK
ELISABETH GENN
JENNER & BLOCK LLP
919 Third Avenue,
Floor 37
New York, NY 10011
(212) 891-1627

February 28, 2008

* *Counsel of Record*

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Supreme Court of the United States

PETE GEREN, SECRETARY OF THE ARMY, et al.,

Petitioners,

v.

SANDRA K. OMAR AND AHMED S. OMAR,
as next friends of Shawqi Ahmad Omar,

Respondents.

MOHAMMAD MUNAF, et al.,

Petitioners,

v.

PETE GEREN, SECRETARY OF THE ARMY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR REHEARING

AZIZ Z. HUQ
JONATHAN HAFETZ
BRENNAN CENTER FOR JUSTICE
NEW YORK UNIVERSITY
SCHOOL OF LAW
161 Avenue of the Americas,
12th Floor
New York, NY 10013
Telephone: (212) 998-6730

ERIC M. FREEDMAN
250 West 94th Street
New York, NY 10025
Telephone: (212) 665-2713

JOSEPH MARGULIES*
MACARTHUR JUSTICE CENTER
NORTHWESTERN UNIVERSITY
SCHOOL OF LAW
357 East Chicago Avenue
Chicago, IL 60611
Telephone: (312) 503-0890

Counsel for the Habeas Petitioners

*Counsel of Record
July 7, 2008

[Additional Counsel Listed On Inside Cover]

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ROBINS, KAPLAN, MILLER & CIRESI L.L.P.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402
Telephone: (612) 349-8500

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INTRODUCTION

Pursuant to Supreme Court Rule 44.1, Mohammad Munaf, Shawqi Omar, and their next friends ("the Habeas Petitioners") respectfully seek rehearing of Part IV.A of this Court's decision issued June 12, 2008 ("the Opinion"). Habeas petitioners are acutely aware of the extraordinary nature of such relief. But rehearing is warranted in this case for two reasons: the Opinion's assumption of facts in the absence of a record or decision below, and the grave and unintended repercussions that the Opinion will have for overseas Americans' core Due Process rights.

First, the crux of the Court's argument appears to depend on factual assumptions that no lower court adjudicated, and that remain hotly contested. Most importantly, the Opinion is centered on the existence of an Iraqi interest in criminal prosecution of the Habeas Petitioners. The evidence in the record does not adequately substantiate this interest as to either Mr. Munaf or Mr. Omar. Accordingly, the Court should grant rehearing to allow adjudication of these issues and remand to lower federal courts for appropriate factual determinations.

Even if the Court were unwilling to rule for the habeas petitioners on this ground, the Court should at the very least correct the factual assertions in the opinion that are not supported by the record. As the Court noted, the Habeas Petitioners may lodge challenges under the substantive component of the Due Process Clause and the Foreign Affairs Reform and

Restructuring Act of 1998 ("FARR Act"), div. G, 112 Stat. 2681-761, such that the state of the factual record may be relevant in regard to those claims. *See, e.g.*, *Securities & Exch. Com. v. Dexel & Co.*, 349 U.S. 910, 913 (1955); *Slochower v. Bd. of Higher Educ.*, 351 U.S. 944 (1956); *see also Maryland for the Use of Levin v. United States*, 382 U.S. 159 (1965) (granting rehearing as to clarify the need for further proceedings below on unresolved issues).

Second, the Court should grant this petition for rehearing in light of the consequences of its Opinion for core constitutional rights of U.S. citizens overseas. Even as limited by the Court, the Opinion may have substantial and deleterious unintended effects on large categories of innocent persons swept up into military detention, including dependents of military personnel, journalists, and aid workers. It would allow the Government to avoid meaningful review when detaining a citizen overseas merely by claiming an intention to transfer the citizen to another sovereign. *Cf. Hamdi v. Rumsfeld*, 542 U.S. 507, 530 (2004) (plurality opinion) (noting the "very real" risks to constitutional rights of journalists and humanitarian workers in the context of foreign countries in which conflict activities are ongoing). The risk of erroneous deprivation of liberty does not diminish because midway through a detention the Government decides to hand a person over to another sovereign that has no interest in prosecuting him or her.

I. The Court Should Grant Rehearing In Order To Correct Factual Misapprehensions In Its Opinion.

Both the Court's opinion and Justice Souter's concurring opinion stress the fact-bound nature of the June 12, 2008, decision. *Munaf v. Geren*, 128 S. Ct. 2207, 2221 (2008); *id.* at 2228 (Souter, J., concurring). The Opinion, however, relies on factual assumptions regarding several sharply contested matters crucial to the final judgment without the benefit of briefing, a hearing, or any findings below. The Court should therefore grant rehearing and clarify that its Opinion is not a substitute for whatever findings may be made in the future by the lower courts. It should then remand for an adjudication of facts on which the judgment depends. At the very least, it should clarify that the Opinion has not substituted legal conclusions for whatever findings lower courts make in the future.

In dismissing a habeas petition on the merits "for failure to state a claim," *Munaf*, 128 S. Ct. at 2220 (internal citation omitted), *the habeas petitioner's* allegations must be "taken as admitted." *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). The Opinion inverts this standard by relying on unsupported assertions by the Government as the ground of decision. This is of special concern because, as the Court recognized, it was "proceed[ing] further" than any of the lower courts in these cases – i.e., reaching issues on which no findings of fact exist. *Munaf*, 128 S. Ct. at 2219.

Of central importance, the Opinion relies on Government assertions about the existence of ongoing Iraqi criminal proceedings that have yet to be substantiated by record evidence. It states that "[t]here is . . . no question that Munaf is the subject of ongoing criminal proceedings and that Omar would be but for the present injunction." *Id.* at 2221. The Opinion also asserts that "Omar and Munaf are being held by United States Armed Forces at the behest of the Iraqi Government pending their prosecution in Iraqi courts." *Id.* at 2223. With respect to Mr. Munaf, the Opinion relies on the recent judgment of the Iraqi appellate court *acquitting* Mr. Munaf of wrongdoing. *Id.* at 2223 (citing *In re Hikmat*, No. 19/Pub. Comm'n/2007). With respect to Omar, the Opinion relies on a referral by the Multi-National Force-Iraq (MNF-I) for prosecution, and not on any evidence of Iraqi activity. *Id.* at 2211. Under even the most lax view of the record, these data points cannot sustain the factual conclusions relied on by the Court as the basis for its decision.

Simply put, the record does not show that Iraqi authorities intend to investigate or prosecute Mr. Omar, or that they still intend to proceed with criminal proceedings against Mr. Munaf. The record shows only that the U.S. Government wishes to be rid of its own citizen detainees – and to avoid federal habeas review – by moving them to another sovereign's custody.

As to Mr. Munaf, the Opinion relies on an Iraqi judgment *acquitting* him to justify his continued detention. *Munaf*, 128 S. Ct. at 2223. The Opinion

correctly notes that this Iraqi judgment of acquittal directs that *all* the defendants in that case, including Mr. Munaf, "remain in custody pending the outcome" of unspecified future proceedings. *Id.* (internal citation omitted). But the Opinion then draws the unwarranted inference that the Iraqi courts have an interest in a new prosecution of Mr. Munaf. Rather than reaching that premature conclusion, the Court should have remanded back to the district court to ascertain whether Mr. Munaf's detention, in fact, remains "an integral part of the Iraqi system of criminal justice," *id.*, (if it ever was), or, as petitioner asserts, a case of U.S. officials holding a U.S. citizen without sufficient cause and without any real Iraqi interest.

In Mr. Omar's case, the only salient piece of evidence is a declaration from a U.S. government official stating that "MNF-I ascertained that the Iraqi judiciary would proceed with charging Mr. Omar in the Central Criminal Court of Iraq (CCCI)." Petition for Writ of Certiorari at 104a, *Omar v. Geren*, 128 S. Ct. 2207 (2008) (No. 06-1666). It is only on the basis of this MNF-I decision – not any decision or action by the Iraqi government – that the Government's declarant has asserted that "Mr. Omar is currently pending an Investigative Hearing before the CCCI." *Id.* There is no evidence at all in the record that *Iraq* wishes to prosecute Mr. Omar. Nothing in the record even hints at an Iraqi interest in either investigation or prosecution. Rather, it shows only that *the United States* wants to deposit Mr.

Omar in an Iraqi jail. Notably, the Iraqi government made no progress on this investigation in the months and years since the MNF-I "ascertained" its intentions.[1]

The Court should at a minimum clarify its Opinion on these matters lest the courts below confuse legal holdings with factual findings. The Court has an interest in avoiding any such confusion because the question whether there is indeed any Iraqi intention to prosecute Mr. Munaf or Mr. Omar is the centerpiece of the Court's analysis.[2] Indeed, Justice Souter's concurrence makes clear that the "essential" "circumstances" of the Opinion's holding include the Iraqi decision to prosecute. *Munaf*, 128 S. Ct. at 2228 (Souter, J., concurring).

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[1] Notably, the Court finds that a *trial* against Mr. Omar would be barred by the disputed injunction, *Munaf*, 128 S. Ct. at 2224 n.4, but does not indicate that *investigation* by the CCCI was ever proscribed.

[2] The Court also notes in passing a "concer[n] about unwarranted judicial intrusion into the Executive's ability to conduct military operations abroad." *Id.* at 2224. But Mr. Munaf was seized while working as a journalist, and Mr. Omar was arrested at his home, where he was living with his ten-year-old son. Neither Mr. Omar nor Mr. Munaf was bearing arms at the time of his arrest. Neither of them is even "alleged to have committed hostile and warlike acts within the sovereign territory of Iraq during the ongoing hostilities." *Id.* at 2227. As the Government conceded in its briefs, and again at oral argument, this is not a case, like *Hamdi*, about battlefield captures. *See, e.g.*, Transcript of Oral Argument at 67, *Munaf v. Geren*, 128 S. Ct. 2207 (2008) (Nos. 07-394 & 06-1666) ("we don't take the position this is like a battlefield situation.").

Moreover, misinterpretation of the Court's opinion is made all the more likely because it fails in several key passages to make clear that – since the petitions were dismissed without adversarial adjudication – none of the statements made therein dictate the outcomes that would occur if the facts turned out to be different from those assumed by the Court for purposes of its ruling.

II. The Court Should Grant Rehearing In Light Of The Wider Systemic Effects Of Its Opinion.

In an earlier landmark case concerning the rights of U.S. citizens seized and detained by their own government overseas, the Court granted rehearing because of the larger systemic consequences of its decision. *See Reid v. Covert*, 352 U.S. 901 (1956) (granting rehearing). As in *Reid*, this case casts a shadow larger than its immediate impact on the Habeas Petitioners. It imperils the liberty of citizen journalists, aid workers, and the dependents of military personnel – all of whom voluntarily travel to foreign countries, and all of whom may well find themselves in the custody of their government and threatened with transfers to the territorial sovereign. In this regard, the opinion invites circumvention of the principles set forth in this Court's recent judgment in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). For these reasons, the Court should reconsider its judgment in this case.

Like *Reid*, this is a case about the most fundamental of Americans' liberty interests: the freedom from bodily restraint by one's own government. Mr. Omar and Mr. Munaf have each been detained in the custody of their own government for more than three years. For most of that time, there was not even a hint of an Iraqi criminal process. (Even now, the evidence of continuing Iraqi interest in prosecuting either of them in the absence of pressure from the United States is slim to non-existent. *See supra*). The Court has long vindicated citizens' rights against unconstitutional action overseas. *See, e.g.*, *Mitchell v. Harmony*, 54 U.S. 115, 133 (1951) (applying Takings Clause to an extraterritorial taking); *see generally* J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 Geo. L. J. 463, 478 n.86 (2007) (collecting cases). It should not cease to do so now simply because the Government has found an ally willing to shelter it from judicial review, especially given the ever-growing class of citizen aid workers, journalists, and military dependants overseas who would be affected.

The Court stated three years ago in *Hamdi* that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." 542 U.S. at 536 (plurality opinion). The rule announced in these cases risks rendering that wisdom a nullity for some important class of U.S. citizens overseas whenever the Government can persuade another government to move forward with a criminal prosecution.

CONCLUSION

For the foregoing reasons, Habeas Petitioners respectfully ask this Court to grant their petition for rehearing.

Respectfully submitted,

JOSEPH MARGULIES*
MACARTHUR JUSTICE CENTER
NORTHWESTERN UNIVERSITY
SCHOOL OF LAW
357 East Chicago Avenue
Chicago, IL 60611
Telephone: (312) 503-0890
Facsimile: (312) 503-1272

AZIZ Z. HUQ
JONATHAN HAFETZ
BRENNAN CENTER FOR JUSTICE
NEW YORK UNIVERSITY SCHOOL OF LAW
161 Avenue of the Americas, 12th Floor
New York, NY 10013
Telephone: (212) 998-6730
Facsimile: (212) 995-4550

SUSAN L. BURKE
KATHERINE HAWKINS
BURKE O'NEIL LLC
4112 Station Street
Philadelphia, PA 19127
Telephone: (215) 487-6590
Facsimile: (215) 482-0874

ERIC M. FREEDMAN
250 West 94th Street
New York, NY 10025
Telephone: (212) 665-2713
Facsimile: (212) 665-2714

VINCENT MOCCIO
AMY HANF
ROBINS, KAPLAN, MILLER & CIRESI L.L.P.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402
Telephone: (612) 349-8500

Counsel for Petitioner

**Counsel of Record*

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CERTIFICATE OF COUNSEL

Under signed counsel certifies that this Petition for Rehearing is presented in good faith and not for the purposes of delay.

JOSEPH MARGULIES